

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP1880-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2012CF471

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC D. COLBERT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
DAVID M. REDDY, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Eric D. Colbert appeals from an order of the circuit court denying expungement of his conviction for manufacture or delivery of THC. He claims that the denial of expungement violates equal protection and due process. Colbert’s chief arguments were resolved by our supreme court’s decision in *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20, and Colbert fails to properly develop any additional arguments. We affirm.

BACKGROUND

¶2 WISCONSIN STAT. § 973.015 allows the circuit court to order expungement of a conviction at the time of sentencing under certain circumstances. Subject to exceptions, it provides as follows:

[W]hen a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged *upon successful completion of the sentence* if the court determines the person will benefit and society will not be harmed by this disposition.

Sec. 973.015(1m)(a)1. (emphasis added). The statute further defines what it means to successfully complete the sentence:

A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked *and the probationer has satisfied the conditions of probation.*

Sec. 973.015(1m)(b) (emphasis added). This statute forms the backdrop for Colbert’s appeal.

¶3 Colbert pled guilty to one count of delivery of THC as a party to the crime. The State and Colbert jointly recommended that the circuit court make Colbert eligible for expungement of his conviction under WIS. STAT.

§ 973.015(1m)(a)1. The circuit court agreed and made Colbert eligible for expungement “upon successful completion of probation.” Colbert was discharged from probation two years later. However, the department of corrections (DOC) filed a form entitled “notice of failure to meet conditions for expungement.” The form indicated that Colbert had failed to pay a \$220 “Supervision Fee,” which was one of the conditions of probation. Based on this document, the circuit court denied Colbert’s expungement without a hearing because “[a]ll court ordered conditions have not been met.”

¶4 Colbert appealed the decision. He argued that the circuit court erred in denying expungement because expungement is automatically granted upon discharge, and the circuit court could not revisit that decision even if he did not comply with the conditions of probation. Colbert also insisted that successful completion of probation—a prerequisite to expungement—does not require perfect compliance with the conditions of probation. Finally, Colbert suggested that denying him expungement based on failure to pay supervision fees without finding that he had the ability to pay violated equal protection, and the lack of a hearing “raises due process concerns.” We held Colbert’s case to await the Wisconsin Supreme Court’s decision in *Ozuna*, 376 Wis. 2d 1, which addressed some of these issues.

¶5 *Ozuna* definitively resolved Colbert’s first two arguments. The court rejected the notion that expungement happens automatically regardless of a probationer’s compliance with the required conditions of probation. *Id.*, ¶14. “[A] court has no duty to expunge a probationer’s record if the probationer has not satisfied the conditions of probation” because “a person’s statutory entitlement to expungement depends not on whether the court receives a particular notice from DOC, but on whether the probationer meets all of the statutory criteria for the

‘successful completion of the sentence.’” *Id.* (citation omitted). The court likewise rejected the substantial compliance theory Colbert advanced here, and it emphasized that “in order to be entitled to expungement, the probationer must meet all three of the statutory criteria, including satisfying ‘all the conditions of probation.’” *Id.*, ¶13 (citation omitted).

¶6 Post-*Ozuna* we asked the parties to submit supplemental briefs, and both did so. In light of *Ozuna*, Colbert now abandons his arguments that he need not perfectly comply with the conditions of probation as well as his argument that the circuit court had no authority to deny expungement based on his failure to comply with the conditions of probation. In his supplemental brief, Colbert limits his arguments to equal protection and due process.

DISCUSSION

¶7 Colbert first maintains that “to blindly accept the assertion that [he] did not pay his supervision fees raises due process concerns.” He suggests that the circuit court was bound as a matter of due process to hold a factual hearing prior to determining that Colbert did not pay his supervision fees. However, Colbert never contests DOC’s assertion that he failed to pay his supervision fees. The failure to allege any factual dispute is fatal to Colbert’s due process claim. *Ozuna* rejected a nearly identical claim that “the circuit court should have held a hearing before denying expungement” because the defendant did not identify “any relevant factual dispute that such a hearing could have resolved.” *Id.*, ¶26. The court further held that a defendant has no protected liberty interest in expungement “[a]bsent facts permitting a conclusion” that the defendant “was entitled to expungement.” *Id.*, ¶27. Thus, without an alleged factual dispute, Colbert’s due process claim fails. To the extent Colbert aims his due process argument beyond

these clear holdings from *Ozuna*, it is undeveloped and does not merit consideration.

¶8 Colbert also suggests that denying expungement based on unpaid supervision fees may violate equal protection if the probationer is financially unable to pay. Thus, he reasons, the circuit court was required to make some finding that he had the ability to pay prior to its decision to deny expungement. Colbert also points out that the probation officer could have taken alternate action—namely, DOC could have moved the circuit court to extend probation until he had paid the fees or obtained a civil judgment against him.

¶9 The equal protection argument here is sorely undeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). Colbert indicates that his “financial circumstances *may* have made it difficult for him to pay supervision fees,” as evidenced by the fact that he qualified for a public defender. (emphasis added.) But Colbert never actually asserts that he could not pay the \$220 supervision fee. Simply asserting the possibility that he cannot pay—rather than averring that he cannot pay—falls short of asserting facts that could arguably trigger a hearing on an equal protection claim (even assuming such a claim exists).

¶10 Furthermore, Colbert identifies no authority to support his assertion that denying expungement based on failure to pay supervision fees would violate equal protection. Colbert does cite *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 201 N.W.2d 778 (1972), but that case merely held that an indigent defendant could not be imprisoned for failing to pay a criminal fine. *Id.* at 295. That principle is a long way away from here, and Colbert makes no meaningful attempt to connect the dots between *Blessinger* and denial of expungement for

failure to comply with financial obligations imposed as a condition of probation. Nor does he explain why DOC was required to pursue alternative action like extending probation or obtaining a civil judgment. “A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories.” *State v. Jackson*, 229 Wis.2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). This is especially true with constitutional claims like equal protection. As we have explained,

Constitutional claims are very complicated from an analytic perspective, both to brief and to decide. A one or two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal of these constitutional issues to this court. For us to address undeveloped constitutional claims, we would have to analyze them, develop them, and then decide them. We cannot serve as both advocate and court.

Cemetery Servs., Inc. v. Department of Regulation & Licensing, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

¶11 In short, we cannot say whether or when requiring payment of supervision fees as a condition of expungement raises equal protection concerns based on poverty. Such a claim would seem to at least require an assertion that one cannot pay, along with a developed analysis of poverty-based equal protection claims and a proposed framework within which to analyze such arguments as applied to the unique issue of expungement. Colbert’s briefing has not undertaken this substantial legwork; neither will we do it for him.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.